ORAL ARGUMENT NOT YET SCHEDULED
No. 11-1102

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES DEPARTMENT OF THE TREASURY,
BUREAU OF THE PUBLIC DEBT, WASHINGTON, D.C.
Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent,

and

NATIONAL TREASURY EMPLOYEES UNION,
Intervenor.

ON PETITION FOR REVIEW OF A FINAL DECISION OF
THE FEDERAL LABOR RELATIONS AUTHORITY

BRIEF FOR RESPONDENT
FEDERAL LABOR RELATIONS AUTHORITY

ROSA M. KOPPEL
Solicitor
Federal Labor Relations Authority
1400 K Street, N.W., Suite 300
Washington, D.C. 20424
(202) 218-7907

AUGUST 2011

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

The parties to this petition for review are the petitioner, United States Department of the Treasury, Bureau of the Public Debt, Washington, D.C., the respondent, the Federal Labor Relations Authority, and the intervenor, National Treasury Employees Union. There are no amici before this Court.

B. Ruling Under Review

The ruling under review is the Decision and Order on Negotiability Issues of the Federal Labor Relations Authority in *National Treasury Employees Union (Union) and United States Department of the Treasury, Bureau of the Public Debt, Washington, D.C. (Agency),* Case No. 0-NG-3076, issued on February 14, 2011, reported at 65 F.L.R.A. (No. 109) 509.

C. Related Cases

Respondent is not aware of any related cases. However, *United States Department of Commerce, Patent and Trademark Office v. FLRA*, No. 11-1019 (D.C. Cir.) , which involves review of an arbitral award rather than a negotiability appeal (which is the case here), also presents the question of whether the Authority's current "abrogation" standard, rather than its previous "excessive interference" standard, should apply to determine whether an agreed-upon

provision is an "appropriate arrangement" intended to ameliorate the adverse effects of the exercise of a management right. In an order dated June 6, 2011, this Court ordered that the instant case and No. 11-1019 be argued on the same day before the same panel.

/s/ Rosa M. Koppel
ROSA M. KOPPEL
Attorney for the Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Page No.

*Authorities chiefly relied upon are marked with an asterisk.

DECISIONS OF THE FEDERAL LABOR RELATIONS AUTHORITY

STATUTES AND REGULATIONS

MISCELLANEOUS

GLOSSARY

Agency	United States Department of the Treasury, Bureau of the Public Debt, Washington, D.C.
Authority	Federal Labor Relations Authority
BPD	United States Department of the Treasury, Bureau of the Public Debt, Washington, D.C.
EPA	*United States Environmental Protection Agency*, 65 FLRA 113 (2010)
FLRA	Federal Labor Relations Authority
JA	Joint Appendix
NTEU	National Treasury Employees Union
Statute	Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135
Union	National Treasury Employees Union

ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-1102

UNITED STATES DEPARTMENT OF THE TREASURY,
BUREAU OF THE PUBLIC DEBT, WASHINGTON, D.C.,
Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent,

and

NATIONAL TREASURY EMPLOYEES UNION,
Intervenor.

ON PETITION FOR REVIEW OF A FINAL DECISION OF
THE FEDERAL LABOR RELATIONS AUTHORITY

BRIEF FOR RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

STATEMENT OF JURISDICTION

The decision under review in this case was issued by the Federal Labor Relations Authority ("FLRA" or "Authority") on February 14, 2011. The Authority's decision is published at 65 FLRA (No. 109) 509. A copy of the

decision is included in the Joint Appendix ("JA") 192. The Authority exercised jurisdiction over the case pursuant to § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 ("Statute").[1]

STATEMENT OF THE ISSUE

Whether the Authority's adoption of the abrogation standard to assess whether agreed-upon contract provisions are "appropriate arrangements" within the meaning of § 7106(b)(3) of the Statute is reasonable.

STATEMENT OF THE CASE

This case arose as a negotiability proceeding brought under § 7117 of the Statute. In particular, when the parties have negotiated over proposals that become provisions[2] of an executed agreement, the agency head has 30 days from the time the agreement is executed within which to review the agreement, and must approve it if it is "in accordance with the provisions of [the Statute] and any other applicable law, rule, or regulation." 5 U.S.C. § 7114(c). If the agency head

[1] Pertinent statutory provisions, regulations, and rules are set forth as Addendum A to this brief.

[2] The Authority's regulations explicitly distinguish a "proposal" from a "provision". Under the Authority's regulations, a "proposal" means "any matter offered for bargaining that has not been agreed to by the parties." 5 C.F.R. §2424.2(e). A "provision" means "any matter that has been disapproved by the agency head on review pursuant to 5 U.S.C. § 7114(c)." 5 C.F.R. §2424.2(f).

disapproves the agreement, pursuant to § 7117 of the Statute, the union may file a petition for review. At the end of the 30 days, the agreement automatically takes effect if the agency head either has approved the agreement or has not taken action. 5 U.S.C. § 7114(c)(3).

The U.S. Department of the Treasury, Bureau of the Public Debt (BPD) and the National Treasury Employees Union (NTEU) renegotiated a term collective bargaining agreement and submitted it for agency head review under § 7114(c) of the Statute. The agency head, finding some provisions to be contrary to law, disapproved the agreement. NTEU sought a decision from the Authority with respect to several of these provisions. The Authority (Member Beck dissenting) found the provisions not to be contrary to law and ordered BPD to rescind its disapproval.

BDP now seeks review of those portions of the Authority's Decision and Order finding Article 11, Section 4B, Article 18, Section 14B, and Article 22, Section 3B negotiable.

STATEMENT OF THE FACTS

A. Background

BPD and NTEU renegotiated a term collective bargaining agreement. JA 7. The agreement was timely submitted for agency head review under § 7114(c) of

the Statute, and the agency head found 62 of the provisions contrary to law. JA 7-9. NTEU filed a petition with the Authority seeking review of 55 of the 62 provisions. JA 11-13. The parties were able to resolve their dispute as to most of these provisions, leaving six provisions for resolution. See JA 85-88; 89-92; 97-99; 101-103; 105-106; 108. Afterwards, NTEU withdrew a provision from its petition and agreed to renegotiate it, leaving five provisions for resolution. JA 144. The Authority addressed all five provisions, but only three provisions, summarized below, are now at issue.

Under Article 11, Section 4B and Article 18, Section 14B, the parties agreed to performance appraisal processes for employees detailed or temporarily promoted to positions for fewer than 120 days. FLRA Op. at 3 (JA 194).[3] Under the processes, before the employees may be held responsible for performance expectations, they must receive the expectations in writing – either by e-mail or hard copy. *Id*. An employee cannot be disciplined based on the expectations without first having received a written notice of them, even if the employee received verbal notice. *Id*.

Under Article 22, Section 3B, if BPD suspects an employee of abusing emergency annual leave, then BPD must counsel the employee. FLRA Op. at 11

[3] The full text of the provisions appears in Addendum B to this brief. It is also set out in the Authority's decision. FLRA Op. at 2-3,11 (JA 193-94, 202).

(JA 202). If the employee continues to abuse emergency annual leave after receiving counseling, then BPD may issue a leave restriction notice. *Id*.

The Authority found that all three provisions affect the exercise of management rights but are appropriate arrangements. In so finding, the Authority modified its standard for determining whether an agreed-upon provision constitutes an appropriate arrangement. FLRA Op. at 1 (JA 192). Specifically, the Authority explained that it would apply an abrogation (waiver) standard instead of the excessive-interference standard that it applies to proposals. FLRA Op. at 1-2 (JA 192-93).

B. The Authority's Decision

As relevant here, the Authority found that Article 11, Section 4B, Article 18, Section 14B, and Article 22, Section 3B of the parties' agreement are appropriate arrangements within the meaning of § 7106(b)(3) of the Statute and, thus, not contrary to § 7106(a)(2)(A) and (B) of the Statute.

1. **Article 11, Section 4B and Article 18, Section 14B**

The Authority found that Article 11, Section 4B and Article 18, Section 14B would prohibit BPD from holding employees responsible for their performance expectations if they had not been communicated to the employees in writing. FLRA Op. at 5 (JA 196). In so doing, the Authority first reassessed the framework

it previously had applied when assessing whether agreed-upon provisions are appropriate arrangements. *Id.*

a. The Authority's Revised Analytical Framework

The framework that the Authority reassessed and revised in the context of agreed-upon provisions is set forth in *NAGE, Local R14-87*, 21 FLRA 24 (1986) (*KANG*). Under *KANG*, the inquiry is: (1) whether a proposal or provision is intended to be an arrangement for employees adversely affected by a management right, and, if so (2) whether the proposal or provision is inappropriate because it "excessively interferes with" management's rights. FLRA Op. at 5 (JA 196). In determining whether there is excessive interference, the Authority balances the proposal's or provision's benefits to employees against its burdens on management. *Id*.

In this decision, the Authority revised this framework for provisions, replacing the excessive-interference standard with the abrogation standard, under which the Authority assesses whether the provision waives the management right(s) that the provision affects. FLRA Op. at 5-6 (JA 196-97). However, it made clear that the excessive-interference standard would continue to apply to proposals to which the parties have not yet agreed. FLRA Op. at 6 (JA 197).

The Authority went on to explain its decision to apply different standards for proposals and agreed-upon provisions. As an initial matter, the Authority found that being outside the duty to bargain and being contrary to law, rule, or regulation are not coextensive concepts. Specifically, it found that the plain language of the Statute and Authority precedents demonstrate that a matter that is outside the duty to bargain is not necessarily contrary to law, rule, or regulation. FLRA Op. at 6 (JA 197).

As to the plain wording of the Statute, the Authority contrasted §7117(c)(1) of the Statute (relating to the statutory duty to bargain over proposals) with §7114(c)(2) of the Statute (relating to agency head review of provisions). The Authority noted that §7117(c)(1) permits a union representative to file a negotiability appeal "if an agency involved in collective bargaining . . . alleges that the duty to bargain in good faith does not extend to" the proposal. By contrast, the Authority explained, §7114(c)(2) does not speak in terms of whether an agreed-upon provision is within the duty to bargain. Instead, as the Authority pointed out, §7114(c)(2) requires that the agency head approve an agreement reached by the parties if it is "in accordance with the provisions of [the Statute] and any other applicable law, rule, or regulation." FLRA Op. at 6 (JA 197). The Authority pointed out that §7114(c)(2) does not authorize an agency head to disapprove

matters that it finds to be outside "the duty to bargain," but instead, limits disapproval by an agency head to agreed-upon provisions that are contrary to law. *Id*.

Consistent with the above, the Authority explained that longstanding precedent confirms the statutory limitation on the scope of what an agency head may disapprove under §7114(c)(2). Specifically, the Authority pointed to precedent regarding a contract provision negotiated under §7106(b)(1)[4], which provision is inherently outside the duty to bargain but not contrary to law and, as a result, may not be disapproved by an agency head. FLRA Op. at 6-7 (JA 197-98).

The Authority also relied on precedent confirming the difference between being outside the duty to bargain and being contrary to law in the context of contract provisions enforced in arbitration awards: *United States Environmental Prot. Agency*, 65 FLRA 113 (2010) (*EPA*). FLRA Op. at 7 (JA 198). In *EPA*, the Authority reinstated a standard that it had employed from 1990 to 2002, the abrogation standard, in assessing whether a contract provision enforced in an arbitration award is contrary to management rights under §7106(a) of the Statute or is an appropriate arrangement under §7106(b)(3). *EPA*, 65 FLRA at 117. The

[4] Under this section, an agency and a union, "at the election of the agency," may negotiate "on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work." 5 U.S.C. §7106(b)(1).

Authority noted in *EPA* that, at the bargaining table, agency management is permitted to agree to a broader range of proposals than those strictly within its duty to bargain, and that this also applies when the proposals affect management rights under §7106(a) of the Statute. *Id*. at 117-118. For this reason, the Authority found it appropriate, in *EPA*, to assess whether an arbitrator is enforcing an appropriate arrangement under §7106(b)(3) by applying the abrogation standard instead of the excessive interference standard used to determine whether proposals to which the parties have not agreed are appropriate arrangements. *Id*.

The Authority pointed out that the pertinent wording of §7122(a) (governing Authority review of arbitration awards) is substantively identical to the pertinent wording of §7114(c)(2) (governing agency head review of agreements). FLRA Op. at 7-8 (JA 198-99). Specifically, as the Authority explained, §7122(a) provides that the Authority shall set aside an arbitration award if it is "contrary to any law, rule, or regulation" and that §7114(c)(2) provides that an agency head shall approve an agreement if it is "in accordance with the provisions of [the Statute] and any other applicable law, rule, or regulation." *Id*. Accordingly, the Authority found it appropriate to apply an abrogation standard both when assessing whether a contract provision enforced by an arbitration award is an appropriate

arrangement and whether a contract provision disapproved by an agency head is an appropriate arrangement. *Id*.

Further, the Authority explained that its decisions to apply the abrogation standard when assessing both agreed-upon provisions and provisions enforced in arbitration awards are based not only on the plain wording of the Statute but also on a policy of deferring to bargaining parties' choices about what is and is not appropriate. FLRA Op. at 8-9 (JA 199-200). The Authority noted that, in *EPA*, it reiterated that, during bargaining, the parties' representatives should assess the burdens that a proposal would impose on management and the benefits that it would afford employees. As the Authority noted, in *EPA*, it stated its "justifiable reluctance" to substitute its judgment for that of the negotiating parties. FLRA Op. at 8 (JA 199).

In this regard, the Authority explained that it defers to the bargaining parties – not the agency head – when assessing the provision's meaning. FLRA Op. at 9 (JA 200). In addition, the Authority noted that a contract becomes effective even where an agency has not timely submitted the contract for agency-head review or where the agency head does not timely disapprove a provision. *Id*. (citing *U.S. Dep't of the Treasury, Bureau of Engraving & Printing*, 44 FLRA 926, 938-40 (1992)). Thus, the Authority concluded, bargaining parties' choices can have

binding effects, without regard to the potential concerns of agency heads. *Id*. Finally, the Authority explained that deferring to the bargaining parties' choices and applying an abrogation standard in cases where the parties have agreed to contract provisions is consistent with the Statute's requirement that agencies "be represented at . . . negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment[.]" 5 U.S.C. §7114(b)(2). What §7114(b)(2) reflects, the Authority explained, is that agencies "are required to provide bargaining representatives who adequately represent management's interests at the bargaining table *before* any agreement is reached." FLRA Op. at 9 (JA 200) (emphasis in original). Therefore, the Authority explained, the relative burdens a proposal imposes on management are appropriately assessed during negotiations and, short of waiver, not reassessed after there is an agreement.

b. The Authority's Application of the Revised Analytical Framework

Applying its revised analytical framework, the Authority found Article 11, Section 4B and Article 18, Section 14B to be arrangements for employees adversely affected by the exercise of the agency's management right to evaluate employees' work performance. FLRA Op. at 10 (JA 201). The Authority noted that it had found that a similar provision – one that lessened the likelihood that an employee would be affected by a negative performance evaluation because of

matters beyond an employee's control – constituted an arrangement. *Id*. (citing *Patent Office Prof'l Ass'n*, 47 FLRA 10, 35-36 (1993)). Further, the Authority found both provisions to be sufficiently tailored to benefit those employees who receive negative performance evaluations and suffer related adverse effects such as discipline. *Id*. In addition, the Authority found that the provisions do not preclude management from exercising its rights to direct employees and assign work under §7106(a)(2)(A) and (B) of the Statute. Therefore, the Authority found that the provisions do not abrogate management rights and, thus, are appropriate arrangements. FLRA Op. at 10 (JA 201).

2. **Article 22, Section 3B**

The Authority found that Article 22, Section 3B would preclude BPD from placing an employee on emergency annual leave restriction until after the agency has counseled the employee regarding the suspected leave abuse. As such, the Authority found that the provision affects management's right to discipline employees. FLRA Op. at 13 (JA 204).

a. **The Authority's Application of the Revised Analytical Framework**

Applying its revised analytical framework, the Authority found Article 22, Section 3B to be an arrangement for employees adversely affected by management's exercise of its right to discipline. FLRA Op. at 13 (JA 204). In this

regard, the Authority explained that the provision would protect employees suspected of abusing emergency annual leave from being placed on leave restriction without first receiving counseling and an opportunity to correct the problematic leave usage. FLRA Op. at 13-14 (JA 204-05). Moreover, the Authority found the provision to be sufficiently tailored in that it applies only to employees suspected of emergency annual leave abuse who had not yet received counseling. FLRA Op. at 14 (JA 205).

In addition, the Authority found that the provision does not preclude management from exercising its right to discipline but, instead, merely limits the circumstances under which management may impose one particular form of discipline – an emergency annual leave restriction. Therefore, the Authority found that the provision does not abrogate a management right and, thus, is an appropriate arrangement. FLRA Op. at 14 (JA 205).

STANDARD OF REVIEW

Authority decisions are reviewed "in accordance with the Administrative Procedure Act," and may be set aside only if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" *BATF v. FLRA*, 464 U.S. 89, 97 n.7 (1983); *see also Pension Benefit Guaranty Corp. v. FLRA*, 967 F.2d 658, 665 (D.C. Cir. 1992). This review is narrow and courts "will uphold

a decision of less than ideal clarity if the agency's path may be reasonably discerned." *AFGE, Local 2303 v. FLRA*, 815 F.2d 718, 722 (D.C. Cir. 1987) (quoting *Bowman Transp., Inc. v Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)); *Penick Corp., Inc. v. DEA*, 491 F.3d 483, 488 (D.C. Cir. 2007).

"Congress has specifically entrusted the Authority with the responsibility to define the proper subjects for collective bargaining, drawing upon its expertise and understanding of the special needs of public sector labor relations." *Library of Congress v. FLRA*, 699 F.2d 1280, 1289 (D.C. Cir. 1983). As such, "the Authority is entitled to considerable deference when it exercises its special function of applying the general provisions of the [Statute] to the complexities of federal labor relations." *BATF v. FLRA*, 464 U.S. at 97 (citation omitted). Where the Statute is ambiguous, the matter is left to the Authority to determine within appropriate legal bounds. *NFFE, Local 1309 and FLRA v. Dep't of the Interior*, 526 U.S. 86, 98 (1999) (*NFFE*).

An Authority's decision "will be upheld if the FLRA's construction of the [Statute] is 'reasonably defensible.'" *Overseas Educ. Ass'n v. FLRA*, 827 F.2d 814, 816 (D.C. Cir. 1987) (citation omitted). A court's task is to decide whether "given the existence of competing considerations that might justify either [the Authority's or the petitioner's] interpretation, the Authority's interpretation is clearly contrary

to statute or is an unreasonable one." *AFGE, AFL-CIO v. FLRA*, 778 F.2d 850, 861(D.C. Cir. 1985)(citing *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984).

The Authority's reasoned decision to adopt the abrogation standard when assessing whether agreed-upon provisions are "appropriate arrangements" under § 7106(b)(3) of the Statute does not subject the Authority to a heightened standard of review. *See FCC v. Fox Television Stations, Inc.*, ___ U.S. ___, 129 S.Ct. 1800, 1810-11 (2009) (*FCC*); Dillmon v. NTSB, 588 F.3d 1085, 1089 (D.C. Cir. 2009) (*Dillmon*). To the contrary, an agency "is free to alter its past rulings and practices even in an adjudicatory setting." *Dillmon*, 588 F.3d at 1089, *quoting Airmark Corp. v. FAA*, 758 F.2d 685, 691-92 (D.C. Cir. 1985). To be sure, an agency must display awareness that it is changing its position and provide an adequate explanation for its departure from its established precedent. *Id*. at 1090. But, it need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one. *FCC*, 129 S.Ct. at 1811. Instead, it suffices "if the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better." *Id*. (emphasis omitted).

Finally, if an agency's reason for its change in policy is clear both from the decision being challenged and from the agency's earlier decisions, then the change

should be upheld as adequately explained. *See Domtar Maine Corp. v. FERC*, 347 F.3d 304, 312 (D.C. Cir. 2003) (decision upheld where its rationale could be reasonably discerned from both the decision, itself, and from the agency's decisions in other cases).

SUMMARY OF ARGUMENT

This Court should affirm the Authority's decision. In determining that three agreed-upon provisions in the parties' collective bargaining agreement that were disapproved by the agency head are appropriate arrangements, the Authority adopted the abrogation standard of review. From 1990 to 2002, the Authority employed the abrogation standard when assessing whether contract provisions that affect management rights and are enforced in an arbitration award are appropriate arrangements. Last year, in *EPA*, the Authority reinstated the abrogation test for arbitral awards. The Authority's decision here, like its decision in *EPA*, is thoroughly explained and is reasonable. It is supported by the plain language of the Statute, legislative history, precedent, Authority regulations, and the Statute's policy of promoting collective bargaining.

1. As the Authority explained, the Statute recognizes a distinction between a proposal that is outside the duty to bargain and one that is contrary to law. Proposals that are contrary to law also are outside the duty to bargain. However,

proposals that are outside the duty to bargain, such as proposals over permissive subjects of bargaining and matters that are not conditions of employment, are not necessarily contrary to law. This distinction also applies to proposals that affect a management right. This means that parties are permitted to bargain over a broader range of proposals than those within the duty to bargain as long as they do not abrogate, or waive, a management right. By contrast, the agency head's review of the provisions that the parties have agreed upon is restricted to whether the provisions are contrary to law. Congress did not provide agency heads with the authority to undo the lawful choices of bargaining parties. Therefore, it is appropriate for the Authority to apply one standard – the excessive interference standard – when reviewing the non-negotiability allegations of agency representatives at the bargaining table and a different standard – abrogation – when reviewing agency head disapproval of agreed-upon provisions.

2. As this Court has recognized, the Statute is silent as to what standard the Authority may employ when assessing whether an agreed-upon provision is an appropriate arrangement. The Statute also is silent as to whether or not the Authority may employ different standards under different circumstances. Thus, the Court should give considerable deference to the Authority's interpretation of

the Statute especially when, as here, the Authority thoroughly explains its interpretation.

3. The abrogation standard furthers the Statute's policy of promoting collective bargaining by ensuring parties that the agreements they reach will be honored unless they are contrary to law. It discourages an agency from "pulling the rug" out from under the bargaining parties, who have already balanced the benefits and burdens of agreed-upon provisions. The abrogation standard ensures stability and repose with respect to matters reduced to writing in an agreement.

4. Contrary to BPD's contention, the abrogation standard is not meaningless just because the Authority has yet to find that an agreed-upon provision abrogates a management right. Instead, this merely reflects that bargaining parties know better than to agree to contract provisions that waive management rights. In fact, § 7114(b)(2) of the Statute requires that the parties be represented at negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment.

5. Contrary to BPD's contention, the Authority's decision is fully supported by the Authority's regulations governing negotiability proceedings. The Authority's regulations make a clear distinction between proposals and agreed-upon provisions.

6. Finally, should the Court determine that the abrogation standard is not permissible under the Statute, then the Court should remand to the Authority to determine whether, using a different standard, the agreed-upon provisions are appropriate arrangements.

ARGUMENT

I. THE AUTHORITY REASONABLY DETERMINED THAT THE THREE AGREED-UPON PROVISIONS WERE APPROPRIATE ARRANGEMENTS FOR EMPLOYEES ADVERSELY AFFECTED BY THE EXERCISE OF MANAGEMENT RIGHTS

A. The Authority's Adoption of the Abrogation Standard For Determining Whether Agreed-Upon Provisions Are Appropriate Arrangements is Adequately Explained and is Permissible Under the Statute

The Authority's decision to adopt the abrogation standard when assessing whether an agreed-upon provision is an appropriate arrangement is based on the plain language of the Statute, precedent, and a policy of respecting the choices that parties make at the bargaining table.

1. Application of the abrogation standard to agreed-upon provisions is permissible under the Statute

a. The plain language of §§ 7117(c)(1) and 7114(c)(2) of the Statute and precedent support the Authority's application of different standards of review for proposals and provisions

As the Authority explained in its decision, the Statute recognizes a

distinction between a proposal that is outside the duty to bargain and one that is contrary to law. FLRA Op. at 6 (JA 197). Specifically, a proposal that is contrary to law also is outside the duty to bargain. However, proposals, such as those negotiated under §7106(b)(1) of the Statute or those not involving conditions of employment, are outside the duty to bargain but not contrary to law. FLRA Op. at 6-7 (JA 197-98). As the Authority explained in *EPA*, this distinction also applies to proposals that affect a management right under §7106(a) of the Statute. FLRA Op. at 7 (JA 198) (citing *EPA*, 65 FLRA at 118). This means that parties are permitted to bargain over a broader range of proposals than those within the duty to bargain, including proposals that affect §7106(a) management rights, as long as the proposals do not waive such rights. *See Ass'n of Civilian Technicians, Montana Air Chapter 29 v. FLRA*, 22 F.3d 1150, 1154 (D.C. Cir. 1994) (*ACT*) (an agency may elect to negotiate over dress codes pursuant to §7106(b)(1) of the Statute so long as this would not violate any other applicable law or regulation).

The Authority illustrated this distinction when it compared the plain language of §7117(c)(1) with that of §7114(c)(2) of the Statute. As the Authority explained, §7117(c)(1) provides that a union may file a negotiability appeal with the Authority if, during bargaining, an agency representative "alleges that the *duty*

to bargain in good faith does not extend to [a proposal]." By contrast, under §7114(c)(2), when the agency representative has agreed to bargain over a proposal and it becomes a provision of the parties' agreement, then the agency head "shall approve the agreement . . . if the agreement . . . is *in accordance with the provisions of [the Statute] and any other applicable law, rule, or regulation*." 5 U.S.C. §7114(c)(2)(emphasis added).

Stated otherwise, an agency representative *may*, during collective bargaining, opt to bargain over a proposal not within the duty to bargain. However, once that proposal becomes a provision in the parties' agreement, then the agency head *must* approve the agreement unless it is contrary to law. If the proposal is one that affects management rights under §7106(a) of the Statute, then the agency representative may determine during the course of bargaining that the proposal's burdens on the exercise of management rights are appropriate ones that the agency is willing to bear. It is during collective bargaining that the parties have the opportunity to assess a proposal's burdens on management and the discretion to decide on those proposals to which they will agree. As this Court has recognized, "[b]ecause of the fundamental policy of freedom of contract, the parties are generally free to agree to whatever specific rules they like and, in most circumstances it is beyond the competence of the Authority . . . or the courts to

intervene in the parties' choice." *Dep't of the Navy, Marine Corps. Logistic Base v. FLRA*, 962 F.2d 48, 57 (D.C. Cir. 1992) (citations omitted) (*Marine Corp*.).

By marked contrast, the scope of the agency head's review of an agreed-upon provision is limited. The plain language of §7114(c)(2) provides that the agency head "shall" approve an executed "agreement" if it is in accordance with law. The word "shall" in §7114(c)(2) indicates that the agency head has no discretion in this regard. *ACT*, 22 F.3d at 1153. Thus, it is clear under the Statute that an agency head must approve an agreement unless it violates a law, rule, or regulation. *Id*. The agency head "is not given free reign to prune collective bargaining agreements where local negotiators have come to legally viable arrangements." ACT, 22 F.3d at 1153.

That the agency head's scope of review is narrow is borne out by the legislative history of §7114(c)(2). The agency head review provision first appeared in the Senate version of the Civil Service Reform Act of 1978 and then was later added to the House version in conference. *See* 124 CONG. REC. H13,608 (daily ed. Oct. 14, 1978) (remarks by House manager, Rep. Ford), *reprinted in* Subcommittee on Postal Personnel and Modernization of the House Committee on Postal and Civil Service, *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*,

96th Cong., 1st Sess. 995 (1979) (*Legislative History*); S.2640, 95th Cong., 2d Sess. § 7219 (1978), *reprinted in Legislative History*, *supra,* at 550, 591; *see generally AFGE, AFL-CIO*, 778 F.2d at 1153. (discussing legislative history of § 7114(c)(2)).

The Senate Committee explained that "a substantially identical provision is contained in Executive Order 11491"[5] which was superseded by the Statute. S. REP. NO. 969, 95th Cong., 2d Sess. 109 (1978), *reprinted in Legislative History*, *supra*, at 743, 769. The original Executive Order regulating federal labor-management relations, Executive Order 10, 988[6], simply provided that any agreement "must be approved by the head of the agency." However, the broad scope of that review was narrowed by Executive Order 11,491 to the agreement's conformity with laws, rules, and regulations "in order to prevent 'second-guessing' on substantive issues [by the agency head]." Federal Labor Relations Council, Summary of Developments to 1977, *reprinted in Legislative History*, at 1167.

The legislative history reflects that the agency head review provision was designed to ensure high-level, but narrow, review of executed agreements in order

[5] Executive Order 11,491, 34 Fed. Reg. 17605 (1969), reprinted in 5 U.S.C. § 7101 pp. 43-48 (2006).

[6] Executive Order 10,988, sec. 7, 27 Fed. Reg. 551, 554 (1962), *reprinted in Legislative History*, *supra*, at 1211, 1214.

to spare agency heads from "a continuous burden . . . to review each and every proposal as it arose in the course of day-to-day bargaining." *AFGE, AFL-CIO*, 778 F.2d at 858. Congress did not anticipate that an agency head would act like an agency representative at the bargaining table and conduct his or her own analysis of the burdens and benefits of each proposal that could possibly affect the exercise of a management right. Instead, both the plain language of the Statute and its legislative history make it clear that the scope of what an agency head must disapprove is narrower than the scope of the duty to bargain. Thus, BPD's argument that nothing in either 7117(c)(1) or §7114(c)(2) suggests that an agency head's review authority is of "less" scope than an agency representative's duty to bargain, PB 29, 37-38, is without merit.

Therefore, it is appropriate for the Authority to apply a different standard when reviewing agency head disapproval from that which it applies when reviewing the non-negotiability allegations of agency representatives at the bargaining table.

The Authority's decision here relies upon, and is consistent with, its decision in *EPA*. Based on analogous reasoning, in *EPA*, the Authority found it appropriate to apply a different standard of review when assessing whether a provision enforced in an arbitration award is an appropriate arrangement from the standard of

review it applies when assessing whether a proposal is within the duty to bargain. FLRA Op. at 7 (JA 198) (citing *EPA*, 65 FLRA at 118).

Conversely, it is appropriate for the Authority to employ the same standard of review -- the abrogation standard -- when reviewing exceptions to an arbitration award and agency head disapproval of contract provisions. In both circumstances, the parties have completed bargaining and executed an agreement by duly authorized representatives. As the Authority explained, the pertinent wording in §7122(a)(1) (Authority review of arbitration awards) is substantively identical to the pertinent wording in §7114(c)(2) (agency head review of agreements). Under these provisions, the Authority may set aside an arbitration award and an agency shall disapprove an agreement if the award or agreement is contrary to law, rule or regulation. FLRA Op. at 7-8 (JA 198-99). Finding it appropriate to apply an abrogation standard in both situations, the Authority explained that:

> [I]f a contract provision enforced by an arbitrator is not contrary to §7106 of the Statute, then it cannot be disapproved by an agency head on the basis of §7106. Consistent with this principle, as a contractual arrangement that does not abrogate a management right is not contrary to §7106 in the arbitration context . . . it necessarily follows that an agency head may not rely on §7106 to disapprove such an arrangement.

FLRA Op. at 8 (JA 199) (citation omitted). Thus, when §7106 rights are involved, the Authority's adoption of the abrogation standard when reviewing exceptions to

an arbitration award or when reviewing an agency head's disapproval of a provision is permissible under the Statute.

BPD argues that when management rights under §7106(a) are involved, not being in accordance with law is coextensive with being outside the duty to bargain. PB 29-30, 32-33. According to BPD, if a proposal "impermissibly interferes with" a management right, then it is prohibited by §7106(a) and, as such, is both outside the duty to bargain under §7117(c)(1) and not in accordance with law under §7114(c)(2). PB 30. BPD has it backwards. Of course, a proposal that is contrary to law also is outside the duty to bargain. However, not all proposals that are outside the duty to bargain also are contrary to law. Instead, consistent with longstanding precedent, there is a broad range within which parties may permissibly negotiate over proposals that affect management rights, and abrogation is the "outer limit." *EPA*, 65 FLRA at 117. Agency head review is limited to whether that outer limit has been exceeded.

When a management representative is presented with a proposal that affects the exercise of a management right, the duty to bargain contained in § 7117(c)(1) authorizes the representative to bargain over how much burden on the exercise of §7106(a) rights management is willing to bear. In the negotiations stage, management may choose not to agree to bargain over a proposal that it finds

excessively interferes with management rights but does not necessarily abrogate them. As the Authority stated in *EPA*, "short of waiver, agency management is permitted to agree to proposals affecting its management rights." *EPA*, 65 FLRA at 118.

In contrast, under §7114(c)(2), agency head review is restricted to determining whether a provision to which the parties did agree is contrary to law. The agency head may not revoke the agency representative's exercise of discretion to agree to a provision that affects, but does not abrogate, management rights.

b. Application of the abrogation standard to agreed-upon provisions is permissible under §7106(b)(3) of the Statute

In its decision, the Authority followed its analysis of §7106(b)(3) in *EPA*. FLRA Op. at 7 (JA 198). In *EPA*, the Authority, in analyzing "the plain wording of the Statute," 65 FLRA at 117, found that §7106(b)(3) does not define the standard to be used in determining whether an award is contrary to 7106(a) or is enforcing an appropriate arrangement. *Id*. Indeed, this Court recognized this statutory silence in AFGE, *Local 2782 v. FLRA*, 702 F.2d 1183 (D.C. Cir. 1983)(*AFGE, Local 2782*), and left it up to the Authority to formulate a standard. 702 F.2d at 1186-88.[7]

[7] Contrary to BPD's assertion, PB 31, this Court did not, in *AFGE, Local 2782*, hold that the "excessive interference" standard "is compelled by the plain language

In addition, in *EPA*, the Authority explained that nothing in the Statute precludes the Authority from "distinguishing between the standards used to determine whether a matter is within the duty to bargain under §7106(b)(3) and the standard used to determine whether an award is contrary to law. . . ." 65 FLRA at 117. Even BPD does not argue that either § 7106(b)(3) or any other provision of the Statute expressly *prohibits* the use of different standards under different circumstances. It is undisputed that, on this question, the Statute is silent.

When the Statute is silent or ambiguous on an issue, the Court gives "considerable deference" to the Authority's interpretation of the Statute. *NFFE*, 526 U.S. at 99. In the absence of statutory clarity, the Authority's function is to use its expertise to "give content to the principles and goals set forth in the Act." *Id*. That is precisely what the Authority has done. In its thoroughly explained decision, the Authority found that the differences between bargaining over proposals and agency head review of agreed-upon provisions – differences grounded in statute and longstanding precedent – justify different standards. BPD fails to show that this decision is arbitrary, capricious, an abuse of discretion or otherwise contrary to law.

---

of Section 7106(b)(3)." And, of course, the Court did not address whether or not the Authority could apply a different standard when assessing whether an agreed-upon provision is an appropriate arrangement.

2. Application of the abrogation standard to agreed-upon provisions respects the choices that parties make at the bargaining table

The Authority's decision to apply the abrogation standard to agreed-upon provisions, like its decision in *EPA* to reinstate this standard in its review of arbitration awards, reflects a policy of deferring to the choices of the bargaining parties. JA 199-200. As the Authority has recognized, deference to the parties' bargaining choices "is consistent with the statutory 'policies of: (1) promoting collective bargaining and the negotiation of collective bargaining agreements; and (2) enabling parties to rely on the agreements that they reach, once they have reached them."' *EPA*, 65 FLRA at 118 (citation omitted).

This Court has recognized that, implicit in the statutory purpose of promoting collective bargaining is the need to ensure bargaining parties "stability and repose with respect to matters reduced to writing in the agreement." *Marine Corp*., 962 F.2d at 59. The abrogation standard furthers the goal of certainty in the collective bargaining process by ensuring parties that the deals they have struck will be honored, unless they are contrary to law. It would discourage an agency from "pulling the rug" out from under both its own agency representatives and the union representatives, who already have balanced benefits and burdens and reached an agreement that, in all likelihood, has taken such benefits and burdens into

account throughout the give-and-take of bargaining.

As the Authority explained, a policy of deference to the choices of bargaining parties is consistent with the Statute's requirement, in §7114(b)(2), that agencies be represented at the bargaining table by representatives who are able to adequately represent management's interests before any agreement is reached. It also is consistent with the plain wording of the Statute and its legislative history. As this Court observed, the legislative history of § 7114(c)(2) reveals that the purpose of restricting agency head review of provisions to conformity with the law was to prevent "second- guessing" by agency heads" on substantive issues." *AFGE, AFL-CIO*, 778 F.2d at 858 n.12.[8]

It is evident, then, that Congress, did not intend that an agency head repeat each step of the bargaining parties' substantive analysis of proposals, including reweighing benefits and burdens, during agency head review. Thus, it is appropriate for the Authority, when reviewing the agency head's disapproval, to

[8] In *AFGE, AFL-CIO*, the Court held that the Authority reasonably determined that an agency head may disapprove a contract provision that is contrary to law, rule, or regulation even if that contract had been imposed by the Federal Service Impasses Panel (the Panel). The Court did state that all its decision does is to "allow the head of the agency an extra 30 days to do that which his subordinates could have done earlier," 778 F.2d at 860 n. 16. This means nothing more than that the agency head has 30 days to determine whether an agreement conforms to law, rule, and regulation, something that the agency head's subordinates at the bargaining table also are authorized to do.

apply the abrogation standard rather than to, itself, conduct a reweighing of benefits and burdens that the excessive interference standard would require.

BPD contends that the abrogation standard is "demonstrably meaningless" (PB 35) because the Authority has yet to find that a contract provision abrogates a management right. PB 35-36. However, as the Authority explained, that it is yet to find that a contract provision abrogates a management right proves, if anything at all, that agency negotiators are sufficiently aware of the statutory management rights so as to not inadvertently agree to contract provisions that waive them. FLRA Op. at 9 n.8 (JA 200).

To illustrate this point, the Authority's decision lists some of the "plethora" of decisions, from just the past two years, involving agency representative allegations that *proposals* are outside the duty to bargain because they are contrary to management rights. *Id.* [9] The lack, thus far, of decisions finding that agreed-upon provisions abrogate management rights merely reflects that negotiating parties know better than to agree to contract provisions that waive management rights. *See* 5 U.S.C. § 7114(b)(2) (Bargaining representatives must be "prepared to discuss and negotiate on any conditions of employment").

[9] The Authority noted that this was in stark contrast to the two negotiability decisions it issued in the past two years that involved agency head disapproval of contract provisions on management-right grounds. FLRA Op. at 10 n.8 (JA 201).

That it would be unusual for management representatives to agree to a provision that abrogates management rights does not mean that the Authority could never find abrogation. Indeed, in three decisions in which the majority of Authority Members found that negotiated provisions, as enforced in arbitration awards, excessively interfered with the exercise of management rights, then-Authority Member Carol Waller Pope, in a concurrence, stated that she would have found that the awards abrogated management rights.

In this regard, in *U.S. Dep't of Justice, Federal Bureau of Prisons Federal Transfer Ctr., Okla. City, Okla.*, 58 FLRA 109 (2002), the Authority found that a provision, which as interpreted by the arbitrator, prohibited the agency from vacating posts for "administrative convenience", excessively interfered with management rights. In a concurrence, then-Member Pope stated that she would have found that the provision "abrogates the Agency's rights to assign work and determine the internal security practices" because it left virtually no circumstance under which the agency could leave posts vacant. 58 FLRA at 117.

Similarly, in *U.S. Dep't of Justice, Federal Bureau of Prisons Federal Correctional Complex, Coleman, Fla.*, 58 FLRA 291 (2003), the Authority found that a provision, which as interpreted by the arbitrator, required the agency to assign a correctional officer to guard only one housing unit, excessively

interfered with management rights. In a concurrence, then-Member Pope stated that she would have found that the award abrogated management rights by leaving no circumstance under which the agency could choose not to assign one employee to each housing unit. 58 FLRA at 296.

Finally, in *U.S. Dep't of the Army, Army Signal Center, Fort Gordon, GA*, 58 FLRA 511 (2003), the Authority found that a provision, which as interpreted by the arbitrator, required four fire fighters to be dispatched to fire scenes, excessively interfered with management rights. In a concurrence, then-Member Pope stated that she would have found that the award abrogated management rights by leaving no circumstance under which the agency would be permitted to dispatch a fire truck without four firefighters aboard. 58 FLRA at 514.

Also, BPD contends that the Authority's decision will force agency heads to become directly involved in the collective bargaining process in order to protect management rights, thereby impeding the process. PB 38. However, as the Authority explained, this is pure speculation. As the Authority noted, bargaining parties already have the authority to reach binding agreements with regard to, among other things, the permissive subjects of bargaining set out in § 7106(b)(1), and there is no evidence that this has resulted in agency heads taking on a more active role in collective bargaining over permissive subjects of bargaining. FLRA

Op. at 9 n.8 (JA 200).

B. The Authority's Decision is Fully Supported by its Regulations

Finally, BPD contends that the Authority's decision conflicts with its regulations, which, in BPD's view, make no distinction between proposals and provisions with respect to declarations of non-negotiability. PB 39-40. This contention is baseless. To begin with, the first sentence of 5 C.F.R. § 2424.24(a), which does distinguish between proposals and provisions and the standard applicable to each, states: "The purpose of an agency statement is to inform the Authority and the exclusive representative why a *proposal or provision is not within the duty to bargain or contrary to law, respectively*." 5 C.F.R. § 2424.24(a) (emphasis added). In addition, the definition of "negotiability dispute" in the Authority's negotiability regulations distinguishes between disputes in which an exclusive representative "disagrees with an agency contention that . . . a proposal is outside the duty to bargain" and in which the exclusive representative "disagrees with an agency head's disapproval of a provision as contrary to law." 5 C.F.R. § 2424.2(c). And, further, the regulations contain separate definitions of "proposal" (5 C.F.R. § 2424.2(e)) and "provision" (5 C.F.R. § 2424.2(f)). *See infra*, at p.2 n.2. That the regulations refer to the party that files a statement of position regarding a provision (as well as a proposal) on behalf of management as the "agency" rather

than the "agency head" simply reflects that agency heads, themselves, are not required to represent their agencies in negotiability appeals.

II. SHOULD THE COURT DETERMINE THAT THE AUTHORITY ERRED IN ADOPTING THE ABROGATION STANDARD, THEN IT SHOULD REMAND THE MATTER TO THE AUTHORITY

BPD argues that, assuming this Court finds that the Statute prohibits the Authority from applying the abrogation standard, the proposals excessively interfere with the exercise of management rights. PB 40.[10] However, if the Court should find that the abrogation standard is not permissible under the Statute, then the Court should, consistent with its own precedent, remand to the Authority to determine whether, using a different standard, the provisions are appropriate arrangements.[11]

---

[10] BPD does not disagree with the Authority that the provisions do not abrogate management rights.

[11] Regarding Article 22, Section 3B, governing the discipline of employees found to have abused emergency annual leave, BPD argues that the Authority already held, in *Nat'l Federation of Federal Employees, Local 858*, 42 FLRA 1169, 1171-74 (1991) (*NFFE*), that such a provision excessively interferes with management's right to discipline employees. PB 43-44. BPD contends that the Authority's application of the excessive interference standard to that provision "would have been dispositive of the outcome here." PB 44 n.19. However, the provision involved in *NFFE* placed a greater burden on management than would Article 22, Section 3B. The *NFFE* provision required management to take two steps, oral counseling and a warning letter, before imposing a leave restriction. Article 22, Section 3B requires only that management provide oral counseling before imposing a leave restriction.

CONCLUSION

The petition for review should be denied.

Respectfully submitted,

/s/ Rosa M. Koppel
ROSA M. KOPPEL
Solicitor

Federal Labor Relations Authority
1400 K Street, N.W., Suite 300
Washington, D.C. 20424-0001
(202) 218-7907

August 18, 2011

D.C. Circuit Rule 32(a) Certification

Pursuant to Fed. R. App. P. 32(a)(7) and D.C. Circuit Rule 32(a), I hereby certify that this brief is double spaced (except for extended quotations, headings, and footnotes) and is proportionately spaced, using Times New Roman font, 14 point type. Based on a word count of my word processing system, this brief contains fewer than 14,000 words. It contains 7,765 words excluding exempt material.

/s/ Rosa M. Koppel
Rosa M. Koppel
Counsel for the Respondent

Certificate of Service

I hereby certify that on this 18th day of August, 2011, I caused eight (8) hard copies of the foregoing Brief for Respondent to be filed with the Court and an original to be filed by way of the ECF filing system. I also caused the Brief to be served on counsel for the Agency by way of the Court's ECF notification system and by hand delivery of hard copies to:

Leonard Schaitman, Esq.
Howard S. Scher, Esq.
Attorneys, Appellate Staff
Civil Division, Room 7239
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

Gregory O'Duden, Esq.
Larry J. Adkins, Esq.
National Treasury Employees Union
1750 H Street, NW
Washington, D.C. 20006

/s/ Rosa M. Koppel
Rosa M. Koppel
Counsel for the Respondent

ADDENDUM A

Relevant Statutes and Regulations

ADDENDUM A

Relevant Statutes and Regulations

§ 7105. Powers and duties of the Authority

(a)(1) The Authority shall provide leadership in establishing policies and guidance relating to matters under this chapter, and, except as otherwise provided, shall be responsible for carrying out the purpose of this chapter.

(2) The Authority shall, to the extent provided in this chapter and in accordance with regulations prescribed by the Authority—

(A) determine the appropriateness of units for labor organization representation under section 7112 of this title;

(B) supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit and otherwise administer the provisions of section 7111 of this title relating to the according of exclusive recognition to labor organizations;

(C) prescribe criteria and resolve issues relating to the granting of national consultation rights under section 7113 of this title;

(D) prescribe criteria and resolve issues relating to determining compelling need for agency rules or regulations under section 7117(b) of this title;

(E) resolve issues relating to the duty to bargain in good faith under section 7117(c) of this title;

(F) prescribe criteria relating to the granting of consultation rights with respect to conditions of employment under section 7117(d) of this title;

(G) conduct hearings and resolve complaints of unfair labor practices under section 7118 of this title;

(H) resolve exceptions to arbitrator's awards under section 7122 of this title; and

(I) take such other actions as are necessary and appropriate to effectively administer the provisions of this chapter.

§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

(2) in accordance with applicable laws—

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

(C) with respect to filling positions, to make selections for appointments from—

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source; and

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating—

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

§ 7114. Representation rights and duties

(a)(1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at—

(A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment; or

(B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if—

(i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and

(ii) the employee requests representation.

(3) Each agency shall annually inform its employees of their rights under paragraph (2)(B) of this subsection.

(4) Any agency and any exclusive representative in any appropriate unit in the agency, through appropriate representatives, shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement. In addition, the agency and the exclusive representative may determine appropriate techniques, consistent with the provisions of section 7119 of this title, to assist in any negotiation.

(5) The rights of an exclusive representative under the provisions of this subsection shall not be construed to preclude an employee from—

(A) being represented by an attorney or other representative, other than the exclusive representative, of the employee's own choosing in any grievance or appeal action; or

(B) exercising grievance or appellate rights established by law, rule, or regulation;

except in the case of grievance or appeal procedures negotiated under this chapter.

(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation—

(1) to approach the negotiations with a sincere resolve to reach a collective bargaining agreement;

(2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;

(3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;

(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data—

(A) which is normally maintained by the agency in the regular course of business;

(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and

(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining; and

(5) if agreement is reached, to execute on the request of any party to the negotiation a written document embodying the agreed terms, and to take such steps as are necessary to implement such agreement.

(c)(1) An agreement between any agency and an exclusive representative shall be subject to approval by the head of the agency.

(2) The head of the agency shall approve the agreement within 30 days from the date the agreement is executed if the agreement is in accordance with the provisions of this chapter and any other applicable law, rule, or regulation (unless the agency has granted an exception to the provision).

(3) If the head of the agency does not approve or disapprove the agreement within the 30-day period, the agreement shall take effect and shall be binding on the agency and the exclusive representative subject to the provisions of this chapter and any other applicable law, rule, or regulation.

(4) A local agreement subject to a national or other controlling agreement at a higher level shall be approved under the procedures of the controlling agreement or, if none, under regulations prescribed by the agency.

§ 7117. Duty to bargain in good faith; compelling need; duty to consult

(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

(2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

(3) Paragraph (2) of the subsection applies to any rule or regulation issued by any agency or issued by any primary national subdivision of such agency, unless an exclusive representative represents an appropriate unit including not less than a majority of the employees in the issuing agency or primary national subdivision, as the case may be, to whom the rule or regulation is applicable.

(b)(1) In any case of collective bargaining in which an exclusive representative alleges that no compelling need exists for any rule or regulation referred to in subsection (a)(3) of this section which is then in effect and which governs any matter at issue in such collective bargaining, the Authority shall determine under paragraph (2) of this subsection, in accordance with regulations prescribed by the Authority, whether such a compelling need exists.

(2) For the purpose of this section, a compelling need shall be determined not to exist for any rule or regulation only if—

(A) the agency, or primary national subdivision, as the case may be, which issued the rule or regulation informs the Authority in writing that a compelling need for the rule or regulation does not exist; or

(B) the Authority determines that a compelling need for a rule or regulation does not exist.

(3) A hearing may be held, in the discretion of the Authority, before a determination is made under this subsection. If a hearing is held, it shall be expedited to the extent practicable and shall not include the General Counsel as a party.

(4) The agency, or primary national subdivision, as the case may be, which issued the rule or regulation shall be a necessary party at any hearing under this subsection.

(c)(1) Except in any case to which subsection (b) of this section applies, if an agency involved in collective bargaining with an exclusive representative alleges

that the duty to bargain in good faith does not extend to any matter, the exclusive representative may appeal the allegation to the Authority in accordance with the provisions of this subsection.

(2) The exclusive representative may, on or before the 15th day after the date on which the agency first makes the allegation referred to in paragraph (1) of this subsection, institute an appeal under this subsection by—

(A) filing a petition with the Authority; and

(B) furnishing a copy of the petition to the head of the agency.

(3) On or before the 30th day after the date of the receipt by the head of the agency of the copy of the petition under paragraph (2)(B) of this subsection, the agency shall—

(A) file with the Authority a statement—

(i) withdrawing the allegation; or

(ii) setting forth in full its reasons supporting the allegation; and

(B) furnish a copy of such statement to the exclusive representative.

(4) On or before the 15th day after the date of the receipt by the exclusive representative of a copy of a statement under paragraph (3)(B) of this subsection, the exclusive representative shall file with the Authority its response to the statement.

(5) A hearing may be held, in the discretion of the Authority, before a determination is made under this subsection. If a hearing is held, it shall not include the General Counsel as a party.

(6) The Authority shall expedite proceedings under this subsection to the extent practicable and shall issue to the exclusive representative and to the agency a written decision on the allegation and specific reasons therefor at the earliest practicable date.

(d)(1) A labor organization which is the exclusive representative of a substantial number of employees, determined in accordance with criteria prescribed by the Authority, shall be granted consultation rights by any agency with respect to any Government-wide rule or regulation issued by the agency effecting any substantive change in any condition of employment. Such consultation rights shall terminate when the labor organization no longer meets the criteria prescribed by the Authority. Any issue relating to a labor organization's eligibility for, or continuation of, such consultation rights shall be subject to determination by the Authority.

(2) A labor organization having consultation rights under paragraph (1) of this subsection shall—

(A) be informed of any substantive change in conditions of employment proposed by the agency, and

(B) shall be permitted reasonable time to present its views and recommendations regarding the changes.

(3) If any views or recommendations are presented under paragraph (2) of this subsection to an agency by any labor organization—

(A) the agency shall consider the views or recommendations before taking final action on any matter with respect to which the views or recommendations are presented; and

(B) the agency shall provide the labor organization a written statement of the reasons for taking the final action.

§ 7122. Exceptions to arbitral awards

(a) Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title). If upon review the Authority finds that the award is deficient—

(1) because it is contrary to any law, rule, or regulation; or

(2) on other grounds similar to those applied by Federal courts in private sector labor-management relations;

the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.

(b) If no exception to an arbitrator's award is filed under subsection (a) of this section during the 30-day period beginning on the date the award is served on the party, the award shall be final and binding. An agency shall take the actions required by an arbitrator's final award. The award may include the payment of backpay (as provided in section 5596 of this title).

5 C.F.R. § 2424.2 - Definitions.

In this part, the following definitions apply:

(c) Negotiability dispute means a disagreement between an exclusive representative and an agency concerning the legality of a proposal or provision. A negotiability dispute exists when an exclusive representative disagrees with an agency contention that (without regard to any bargaining obligation dispute) a proposal is outside the duty to bargain, including disagreement with an agency contention that a proposal is bargainable only at its election. A negotiability dispute also exists when an exclusive representative disagrees with an agency head's disapproval of a provision as contrary to law. A negotiability dispute may exist where there is no bargaining obligation dispute. Examples of negotiability disputes include disagreements between an exclusive representative and an agency concerning whether a proposal or provision:

(1) Affects a management right under 5 U.S.C. 7106(a);

(2) Constitutes a procedure or appropriate arrangement, within the meaning of 5 U.S.C. 7106(b)(2) and (3), respectively; and

(3) Is consistent with a Government-wide regulation.

* * * * *

(e) Proposal means any matter offered for bargaining that has not been agreed to by the parties. If a petition for review concerns more than one proposal, then the term includes each proposal concerned.

(f) Provision means any matter that has been disapproved by the agency head on review pursuant to 5 U.S.C. 7114(c). If a petition for review concerns more than one provision, then the term includes each provision concerned.

5 C.F.R. § 2424.24 -Agency's statement of position; purpose; time limits; content; severance; service

(a) Purpose. The purpose of an agency statement of position is to inform the Authority and the exclusive representative why a proposal or provision is not within the duty to bargain or contrary to law, respectively. As more fully explained in paragraph (c) of this section, the agency is required in the statement of position to, among other things, set forth its understanding of the proposal or provision, state any disagreement with the facts, arguments, or meaning of the proposal or provision set forth in the exclusive representative's petition for review, and supply all arguments and authorities in support of its position.

(b) Time limit for filing. Unless the time limit for filing has been extended pursuant to § 2424.23 or part 2429 of this subchapter, the agency must file its statement of position within thirty (30) days after the date the head of the agency receives a copy of the petition for review.

(c) Content. The agency's statement of position must be on a form provided by the Authority for that purpose, or in a substantially similar format. It must be dated and must:

(1) Withdraw either:

(i) The allegation that the duty to bargain in good faith does not extend to the exclusive representative's proposal, or

(ii) The disapproval of the provision under 5 U.S.C. 7114(c); or

(2) Set forth in full the agency's position on any matters relevant to the petition that it wishes the Authority to consider in reaching its decision, including a statement of the arguments and authorities supporting any bargaining obligation or negotiability claims, any disagreement with claims made by the exclusive representative in the petition for review, specific citation to any law, rule, regulation, section of a collective bargaining agreement, or other authority relied

on by the agency, and a copy of any such material that is not easily available to the Authority. The statement of position must also include the following:

(i) If different from the exclusive representative's position, an explanation of the meaning the agency attributes to the proposal or provision and the reasons for disagreeing with the exclusive representative's explanation of meaning;

(ii) If different from the exclusive representative's position, an explanation of how the proposal or provision would work, and the reasons for disagreeing with the exclusive representative's explanation;

(3) A statement as to whether the proposal or provision is also involved in an unfair labor practice charge under part 2423 of this subchapter, a grievance pursuant to the parties' negotiated grievance procedure, or an impasse procedure under part 2470 of this subchapter, and whether any other petition for review has been filed concerning a proposal or provision arising from the same bargaining or the same agency head review; and

(4) Any request for a hearing before the Authority and the reasons supporting such request.

(d) Severance. If the exclusive representative has requested severance in the petition for review, and if the agency opposes the exclusive representative's request for severance, then the agency must explain with specificity why severance is not appropriate.

(e) Service. A copy of the agency's statement of position, including all attachments, must be served in accord with § 2424.2(g).

Addendum B

Pertinent Provisions of the Collective Bargaining Agreement

Article 11, Section 4b

SECTION 4 Performance Appraisals

A. Management has determined that an employee will not be held accountable for, or evaluated on, regularly assigned duties while on detail.

B. When a detail or temporary promotion is expected to be less than one hundred and twenty (120) days, the temporary supervisor shall discuss performance expectations with the employee at the beginning of the detail. Normally, this will occur within five (5) workdays from the beginning of the detail. Such performance expectations shall be confirmed in writing by the temporary supervisor before the employee can be held responsible for such performance expectations. When an employee on detail has performed under the performance expectations for at least ninety (90) days, but less than one hundred and twenty (120) days, an evaluation of the employee's performance while on such a detail shall be furnished in writing from the temporary supervisor of the detail to the employee's regular supervisor. When an employee on detail has performed under the performance expectation for less than ninety (90) days, an evaluation of the employee's performance while on detail may be furnished in the form of a memorandum from the temporary supervisor of the detail to the employee's regular supervisor. The employee's regular supervisor shall give appropriate consideration to such evaluations when evaluating the employee's overall performance.

C. An employee detailed or temporarily promoted for one hundred and twenty (120) days or longer shall receive written critical elements and performance standards as soon as possible but not later than thirty (30) days from the beginning of the detail or temporary promotion. An employee detailed or temporarily promoted for one hundred and twenty (120) days, or longer shall be evaluated in accordance with Article 18, Performance Appraisals.

D. When an employee is detailed outside the agency, Public Debt must make a reasonable effort to obtain appraisal information from the outside organization, which shall be considered in deriving the employee's next rating of record.

E. If an employee's performance while detailed or temporarily promoted will have an impact on the rating of record, the nature of the impact will be noted on the appraisal.

Article 18, Section 14b

SECTION 14 Performance Appraisals While on Details

A. Public Debt has determined that employees will not be held accountable for, or evaluated on, regularly assigned duties while on detail.

B. When a detail or temporary promotion is expected to be less than one hundred and twenty (120) calendar days, the temporary supervisor shall discuss performance expectations with the employee at the beginning of the detail. Normally, this will occur within five (5) work days from the beginning of the detail. Such performance expectations shall be confirmed in writing by the temporary supervisor before the employee can be held responsible. If an employee is provided written expectations, a written evaluation is required when the employee has performed under the expectations for at least ninety (90) calendar days. The evaluation will be provided within thirty (30) calendar days of the end of the detail or temporary promotion.

When an employee on detail has performed under the performance expectations for less than ninety (90) calendar days, an evaluation of the employee's performance while on detail may be furnished in the form of a memorandum from the temporary supervisor of the detail to the employee's regular supervisor. This memorandum will be provided within thirty (30) calendar days of the end of the detail or temporary promotion. The employee's regular supervisor shall give appropriate consideration to such an evaluation when evaluating the employee's overall performance.

C. An employee detailed or temporarily promoted for one hundred and twenty (120) calendar days or longer shall receive a performance plan as soon as possible but not later than thirty (30) calendar days from the beginning of the detail or temporary promotion. An employee detailed or temporarily promoted for one hundred and twenty (120) calendar days or longer shall be evaluated when his annual performance rating is due or

the detail or temporary promotion ends. If necessary, an evaluation must be completed within thirty (30) calendar days of the end of the assignment.

D. If an employee has been detailed outside of Public Debt, the supervisor must make a reasonable effort to obtain appraisal information which must be considered in deriving the employee's rating of record. If the employee has not worked at Public Debt for the minimum appraisal period but has worked outside of Public Debt on a detail, a reasonable effort must be made to secure a performance plan from the borrowing organization in order to construct a rating.

E. If an employee's performance while detailed or temporarily promoted will have an impact on his or her rating of record, the nature of the impact will be noted on the appraisal.

Article 22, Section 3b

SECTION 3 Emergency Annual Leave

A. Requests for approval of emergency annual leave (that is, leave for absences which could not be anticipated in advance) must be made to the immediate supervisor or designee, as soon as possible on the first day of absence. These requests shall be made no later than two (2) hours after the employee's normal reporting time unless the difficulties encountered prevent compliance with the two(2) hour limit, in which case the employee will request approval as soon as possible. If emergency annual leave is requested by an employee and subsequently denied by Public Debt, an employee may be allowed a reasonable amount of annual leave or leave without pay, as appropriate, to report to work before such an employee is charged as absent without leave (AWOL), except for those employees subject to the restrictions in Section 3B.

B. In those cases where Public Debt has sound reason to believe that an employee is abusing "emergency" annual leave, the employee shall be counseled concerning such abuse. If such counseling is unsuccessful, and the employee continues to abuse "emergency" annual leave, Public Debt may issue a written notice to the employee that all subsequent "emergency" annual leave absences must be supported by credible evidence justifying such absences.